

### § 32.13

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer-sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) *Collective bargaining agreements.* Whenever a recipient's obligation to comply with this subpart and to correct discriminatory practices impacts on and/or necessitates changes in a term of a collective bargaining agreement(s) to which the recipient is a party, the recipient shall attempt to achieve compliance consistent with the provisions of § 32.17(a). However a recipient's obligation to comply with this subpart is not relieved by a term of any such collective bargaining agreement(s).

(d) *Compensation.* In offering employment or promotions to handicapped individuals, the recipient shall not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from other source.

[45 FR 66709, Oct. 7, 1980, as amended at 68 FR 51368, Aug. 26, 2003]

### § 32.13 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant, employee or participant unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include;

(1) The overall size of the recipient's program or activity with respect to number of employees, number of par-

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ticipants, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce, and duration and type of training; and

(3) The nature and cost of the accommodation needed.

(c) A recipient may not deny any employment or training opportunity to a qualified handicapped employee, applicant or participant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee, applicant or participant.

(d) Nothing in this paragraph shall relieve a recipient of its obligation to make its program or activity accessible as required in subpart C of this part, or to provide auxiliary aids, as required by § 32.4(b)(7).

[45 FR 66709, Oct. 7, 1980, as amended at 68 FR 51368, Aug. 26, 2003]

### § 32.14 Job qualifications.

(a) The recipient shall provide for, and shall adhere to, a schedule for the review of the appropriateness of all job qualifications to ensure that to the extent job qualifications tend to exclude handicapped individuals because of their handicap, they are related to the performance of the job and are consistent with business necessity and safe performance.

(b) Whenever a recipient applies job qualifications in the selection of applicants, employees or participants for employment or training or other change in employment status such as promotion, demotion or training, which would tend to exclude handicapped individuals because of their handicap, the qualifications shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance. The recipient shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

### § 32.15 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient

may not conduct preemployment medical examinations or make preemployment inquiry of an applicant for employment or training as to whether the applicant is a handicapped person or as to the nature or the severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination, when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally-assisted program or activity, or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment or training to indicate whether and to what extent they are handicapped if:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant, employee or participant to any adverse treatment, and that it will be used only in accordance with this part.

(c) An employer who routinely requires medical examinations as part of the employment selection process must demonstrate that each of the requirements of this subsection are met:

(i) The medical examination shall be performed by a physician qualified to make functional assessments of individuals in a form which will express residual capacity for work or training. Such an assessment does not require clinical determinations of disease or disability, but shall provide selecting or referring officials sufficient information regarding any functional limitations relevant to proper job placement or referral to appropriate training. Factors which may be assessed may include, for example, use of limbs

and extremities, mobility and posture, endurance and energy expenditure, ability to withstand various working conditions and environments, use of senses and mental capacity;

(2) The results of the medical examination shall be specific and objective so as to be susceptible to review by independent medical evaluators and shall be transmitted to the applicant or employee at the same time as the employing official;

(3) The results of the medical examination shall not be used to screen out qualified applicants and employees but to determine proper placement and reasonable accommodation. The employing official using physical or mental information obtained pursuant to this section should be familiar with physical or mental activities involved in performing the job, and the working conditions and environment in which it is carried out. If the applicant is being considered for a variety of jobs having different requirements or skills, the employing official should make a functional assessment of the physical or mental demands of the jobs in order to match the applicant with the most suitable vacancy;

(4) All of potential employees for the jobs are subjected to the medical examination;

(5) The procedures for using medical examinations or the medical information shall be constructed in such a manner that:

(i) A conditional job offer was made or the individual was conditionally placed in a job pool or conditionally placed on an eligibility list prior to the medical examination being performed; or

(ii) The results of the medical examination were considered by the employing official only after a conditional decision to make a job offer or the individual had been placed conditionally in a job pool or conditionally placed on an eligibility list; that is the medical results were the last factor evaluated by the employing officials before a final decision to make an offer of employment was made.

(6) Unless a conditional job offer is made prior to the medical examination, all potential employees for the

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job shall be informed at the time of the medical examination that:

(i) The results of the medical examination are the last factor evaluated by the employing official before a final decision to make an offer of employment is made, and

(ii) The medical examination results shall be transmitted to the employing official and the applicant only after a conditional decision to make a job offer has been made.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Employing officials may obtain the information after making a conditional decision to make a job offer to the applicant or the applicant was placed conditionally in a job pool or placed conditionally on an eligibility list.

(2) Supervisors and managers may be informed regarding restrictions on the work or duties of qualified handicapped persons and regarding necessary accommodations;

(3) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(4) Government officials investigating compliance with the Act shall be provided information upon request.

[45 FR 66709, Oct. 7, 1980, as amended at 68 FR 51368, Aug. 26, 2004]

### **§ 32.16 Listing of employment openings.**

Recipients should request State employment security agencies to refer qualified handicapped individuals for consideration for employment.

### **§ 32.17 Labor unions and recruiting and training agencies.**

(a) The performance of a recipient's obligations under the nondiscrimination provisions of these regulations may necessitate a revision in a collective bargaining agreement(s). The policy of the Department of Labor is to use its best efforts, directly or through the recipients, subgrantees, local officials, vocational rehabilitation facili-

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ties, and other available instrumentalities, to cause any labor union, recruiting and training agency or other representative or workers who are or may be engaged in work under programs or activities receiving Federal financial assistance to cooperate with, and to comply in the implementation of section 504.

(b) To effectuate the purposes of paragraph (a) of this section, the Assistant Secretary may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(c) Whenever compliance with section 504 necessitates a revision of a collective bargaining agreement or otherwise significantly affects a substantial number of employees represented by the union, the collective bargaining representatives shall be given an opportunity to present their views to the Assistant Secretary.

(d) The Assistant Secretary may notify any Federal, State, or local agency of his/her conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his/her judgment has failed to cooperate with the Department of Labor, recipients, subgrantees or applicants in carrying out the purposes of section 504. The Assistant Secretary also may notify other appropriate Federal agencies when there is reason to believe that the practices of any such labor organization or agency violates other provisions of Federal law.

[45 FR 66709, Oct. 7, 1980, as amended at 68 FR 51368, Aug. 26, 2003]

## **Subpart C—Accessibility**

### **§ 32.26 Discrimination prohibited.**

No qualified handicapped individual shall, because a recipient's facilities are inaccessible to or unusable by handicapped individuals, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.